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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1010

MAX SLATTON, JR.,
Petitioner,

vs.

MARTIN K. EBY CONSTRUCTION COMPANY, INC.,
d/b/a EBY & ASSOCIATES OF ARKANSAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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The petitioner Max Slatton respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on November 18, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at — F.2d — (8th Cir. 1974), is attached hereto as Exhibit A.

The unreported decisions of the United States District Court for the Eastern District of Arkansas, dated 11-28-73 and 4-10-74, are attached hereto as Exhibits B and C.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on November 18, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did the trial judge abuse his discretion in granting a remittitur when the jury's verdict was patently within a reasonable and permissible monetary range and was amply supported by the evidence?

STATEMENT OF THE CASE

In a case of established liability under the Jones Act, petitioner's $85,000 jury verdict has been successively reduced by action of the United States District Judge until he has ended up with $17,267, less money than his lost wages to date. This result has been reached even though the jury was instructed on (1) loss of wages, (2) loss of earning capacity, (3) pain and suffering, (4) permanency of the injury, and (5) medical expenses. It has been reached even though the District Judge found specifically after the jury trial:

> There is no question that plaintiff sustained an injury to his back and the Court thinks that the jury could properly find, as it obviously did find, that the injury was permanent, and that the plaintiff was going to have some difficulty with

his back in the future and has sustained some diminution of his ability to work and earn money in the future.

The undisputed record in this case is that, as the result of a serious back injury, petitioner was off work completely for 15½ months. After he was released by his doctor, the Arkansas Employment Security office found a job for him in which he makes one-half the wages of his former occupation, which he can no longer follow. His past wage loss at the time of the trial was $14,000.

Since the trial on 10-17-73, he has lost approximately $7,000 by reason of reduced earning capacity, and will continue to lose $5,000 each year of his life. Over petitioner's life expectancy the loss of earning capacity will total aproximately $200,000. The record is replete with evidence of pain and suffering. There is abundant evidence that petitioner sustained a herniated disc and that his injuries are permanent. The final judgment entered in this case leaves petitioner completely uncompensated for loss of earning capacity, pain and suffering, and the permanency of his injury, even though all these elements of damage are amply supported in the record.

After the jury rendered its verdict for $85,000, the District Judge in response to post trial motions ordered a remittitur of the amount in excess of $50,000 on pain of a new trial on damages. Petitioner unsuccessfully tried to take an interlocutory appeal from this ruling. *Slatton v. Martin K. Eby Const Co., Inc.*, 491 F. 2d 707 (8th Cir. 1974). Relegated to the District Court for a final judgment, petitioner agreed to let Judge Henley try the case on the record previously made since it was obvious that the testimony would be the same and that no verdict in excess of $50,000 would be sustained. After crediting respondent with workmen's compensation payments, he entered judgment for $17,267.04 or about one-fifth of the jury verdict. The Court of Appeals affirmed on appeal from this final judgment. *Slatton v. Martin K. Eby Const. Co., Inc.*, —F2d— (8th Cir. 1974).

REASON FOR GRANTING THE WRIT

The writ of certiorari should be granted in this case because the Court of Appeals, after adopting a proper rule for reviewing remittitur, did not apply the rule in this case. "We conclude that the standard we will apply in determining whether there was an abuse of discretion in ordering the remittitur is whether the remittitur was ordered for an amount less than the jury could reasonably find." — F.2d — at —. This rule is in accord with the Fifth Circuit and the Court of Appeals for the District of Columbia. *Gorsalitz v. Olin Mathieson Chemical Co.*, 456 F.2d 180 (5th Cir. 1972); *Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir. 1969), *Cert.den.* 36 U.S. 835 (1969). It has the approbation of a leading text writer. "It is the only theory which has any reasonable claim of being consistent with the Seventh Amendment." 3 Barron & Holzhoff, Federal Practice & Procedure (Wright Ed.) 1305.1 p. 376.

Could the jury in this case reasonably find more than $50,000 in damages? Was any amount in excess of this figure "grossly and shockingly excessive"? Let us look at the evidence in the light of the elements of damage on which the jury was instructed.

1. *Wage loss.* It was undisputed that plaintiff was off work from May 16, 1972 until September 1, 1973 and that his lost wages during this period amounted to $13,400. On September 1, 1973 he found work through the efforts of the State Employment Security office at one-half his former pay. To date of trial Oct. 17, 1973 (six weeks) he had sustained an additional $600 in lost wages (the difference between his former and present earnings). Certainly the jury was entitled to take the full amount of plaintiff's wage loss in computing damages.

2. *Medical expenses.* The undisputed proof was that his medical expenses were $1,390.94.

3. *Loss of earning capacity.* The jury had a good criterion for arriving at this figure. Petitioner was making $200 a week before he was hurt and is now making $100 per week. Over his life expectancy the loss of earning capacity would amount to approximately $200,000. Reduction to present value would be offset by inflation. If his earning capacity were reduced by one-fourth, the reduction would amount to $100,000 and if reduced by one-eighth $50,000 (the amount of the recovery permitted after remittitur). The latter amount represents only a $25.00 weekly reduction of earning capacity, when to date it has been $100 weekly. In his memorandum and order of 11-18-73, Judge Henley recognized that the jury could find that petitioner "has sustained some diminution of the ability to work and earn money in the future." Petitioner's physician testified as follows:

> Q. Doctor, at that time did you make any finding or evaluation about this man's occupational future?
>
> A. I suggested at that time, because of his history of repeated recurrences of pain and spasm after trying to perform his usual occupation, that he may have some difficulty returning to such occupation. (A. 26-27)

Was it not the province of the jury to put a monetary value on this element of damage? If we subtract the undisputed wage loss to trial ($14,000) and medical ($1,390), this leaves $34,610 or $900 annually over his life expectancy. Would not such a figure be patently low for this element of damage even without taking into account two important remaining elements of damage?

4. *Permanency of the injury.* Much of the dispute in this case revolved around whether the petitioner has sustained a ruptured disc. The Court of Appeals adopted the respondent's position completely as to the herniated disc after earlier stating that "the medical testimony concerning the injury, its permanency, and the prognosis for recovery were in sharp contrast." — F.2d — at

—. The following passage from the Court's opinion is illustrative:

> The plaintiff testified about recurring pain and inability to do heavy work. Neurological tests failed to reveal a ruptured disc or a tendon injury. An electromyographic study secured by plaintiff's doctor showed the plaintiff was basically normal with some "very mild changes" in his left tibial nerve. Another specialist secured by plaintiff's doctor performed a myelographic study in an attempt to determine whether or not the plaintiff had a ruptured or bulging disc in his lower back. The myelograph disclosed no abnormality or irregularity along the spinal canal and the specialist testified that his examination was completely negative. The plaintiff's physician, Dr. Rooney, *thought he might possibly* have a ruptured disc, but that if he did have one, it was healed by February 23, 1973. Dr. Rooney had released the plaintiff for light work within a month of the accident.

With all due deference we must state that this passage misconceives the evidence in this case. Petitioners treating doctor *did* testify that the neurological tests indicated a herniated disc (A. 24-27). The specialist referred to was respondent's witness Dr. Clyde Glover, a radiologist, whom Dr. Rooney, the treating orthopedist, called to assist in the performance of a myelogram. Dr. Rooney actually performed the myelogram (A. 28). The attendance of a radiologist is necessary in this procedure, but it is performed by either an orthopedist or a neurosurgeon. Dr. Rooney and Dr. Glover disagreed as to the interpretation of the myelogram. Dr. Rooney, who was actually the specialist, considered the myelogram to be positive (A. 28-29). Dr. Glover, called by respondent, considered it negative, although on cross-examination he admitted that he had made a notation in the hospital records at the time that it "did not reveal any *definite* abnormality" (A. 62). The testimony as to the myelographic

findings were not undisputed, as indicated by the Court of Appeals, but raised a factual issue for the jury.

The statement by the Court of Appeals that Dr. Rooney thought petitioner might possibly have a herniated disc was apparently based on the following question and answer with reference to an examination on June 27, 1972:

> Q. And on the basis of those clinical findings, did you make a diagnosis on that occasion?
>
> A. I did not make a diagnosis, not specifically, but I did mention that there was a possibility of him having a herniated disc with these findings. (A. 25)

But his condition worsened and Dr. Rooney testified with reference to an examination on August 8, 1972:

> Q. Did you, on this occasion, make a diagnosis, Doctor?
>
> A. I thought at that time that he had findings consistent with a herniation of the disc at the L 4-5 level, which is the next to the lowest disc in the back. (A. 26)

Dr. Rooney admitted him to the hospital on August 13, 1972 where he remained five days. The admission and discharge diagnosis was "herniated disc, L 4-5 bilateral." (A. 27)

The statement in the Court of Appeals opinion about the disc being healed on February 23, 1972 was apparently based on the following questions as asked by respondent's counsel:

> Q. Just briefly, in the examination on February 22, 1973, was the straight leg raising test still negative?
>
> A. Yes.
>
> Q. Was there any muscle spasm present?
>
> A. No.

Q. Did he have normal motion in his lumbar spine?

A. Yes.

Q. Did he have any list at all in his lumbar spine?

A. No.

Q. Now, wouldn't all of these findings that you have just stated be objective findings that would be inconsistent with any presence of a ruptured disc at the L 4-5 level?

A. Consistent with that alone? It could be consistent with a healed disc, too. (A. 42)

We again respectfully submit that Dr. Rooney did not testify that petitioner's ruptured disc was healed on this date. Respondent's attorney selectively took four negative findings and asked if they would not be inconsistent with the presence of a ruptured disc. Dr. Rooney said they could also be consistent with a healed disc. But counsel studiously refrained from asking Dr. Rooney whether in his opinion, based on all his findings and the complete history of this patient, he had a ruptured disc or even a healed disc on this date.

While it is true as noted by the Court of Appeals that Dr. Rooney did release petitioner to try light work within a month after the accident, the record reflects that petitioner tried to return to light work "but got to hurting so bad he had to come home" (A. 77). His condition steadily grew worse for the next two months, and it was necessary to hospitalize him for the second time on 8-13-72 as noted above.

If the petitioner did have a ruptured disc, and there was abundant evidence from which the jury could have so found, it could logically have found such ruptured disc was a permanent injury. The Court of appeals, as noted above, found the medical testimony in "sharp contrast" as to permanency. Judge Henley in his opinion of 11-18-73 said that "the jury could

properly find, as it obviously did find, that the injury was permanent, and that the plaintiff was going to have some difficulty with his back in the future." How much in dollars and cents should a young working man with a wife and two children be compensated for a permanent injury to his back? Under our system of jurisprudence is not this a matter within the jury's competence.

5. *Pain and suffering*. This record is replete with pain and suffering. See Appendix 20, 21, 23, 26, 27, 28, 30, 31, 76, 77, and 78. Besides almost constant back pain over a period of approximately one year and a half, petitioner had to undergo a myelogram—surely one of the most painful procedures known to medicine. In *Gruenthal v. Long Island R.R.*, 393 U. S. 156 (1968), this Court held, in restoring a jury verdict reduced by the Court of Appeals, that $150,000 could be reasonably allocated to pain and suffering in a verdict of $305,000 for a crushed foot.

CONCLUSION

The Court of Appeals did not apply in this case the rule which it adopted as to review of remittitur. Its action contrasts with that of the Court of Appeals for the District of Columbia in *Taylor v. Washington Terminal, supra,* and the Court of Appeals in the Fifth Circuit in *Gorsalitz v. Olin Mathieson Chemical Co., supra.* In those cases the Court carefully reviewed the trial judge's action in light of the jury verdict. In the case at bar every inference, every implication was indulged in favor of the District Judge's view of the case, which completely comported with the position of respondent. The jury's view of the evidence counted for little or nothing with the result that petitioners received a trial on damages from the District Judge and not the jury, as was his entitlement under the Jones Act and the Constitution. If Max Slatton had been sent

to jail without a jury trial, as guaranteed by our statutes and Constitution, it would be a serious matter indeed. It is no less serious when he and his family are denied a decent livelihood by deprivation of the right of trial by jury.

Respectfully submitted

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APPENDIX

EXHIBIT A

United States Court of Appeals
for the Eighth Circuit

Nos. 74-1279 and 74-1302

Max Slatton, Jr.,

Appellant-
Cross-Appellee,

v.

Martin K. Eby Construction Co., Inc., d/b/a Eby and Associates of Arkansas,

Appellee-
Cross-Appellant.

Appeals from the United States District Court for the Eastern District of Arkansas.

Submitted: September 13, 1974

Filed: November 18, 1974

Before Gibson, Chief Judge, Bright, Circuit Judge, and Smith, Senior District Judge.*

Gibson, Chief Judge.

Plaintiff Max Slatton, Jr., while working on a barge in the Arkansas River, injured his back and elected to bring this action for damages therefor under the Jones Act. 46 U.S.C. § 688, and under the maritime doctrine of unseaworthiness. A trial to a

* The Honorable Talbot Smith, United States Senior District Judge, Eastern District of Michigan, sitting by designation.

jury resulted in a verdict of $85,000. The trial court,[1] after offsetting $1,732.96, for workmen's compensation benefits already received by Slatton, ordered a remittitur of $33,267.04, leaving a net judgment of $50,000. The plaintiff refused to accept the remittitur and a new trial was ordered on the issue of damages. After an interlocutory appeal on the remittitur was denied, *Slatton v. Martin K. Eby Construction Co.*, 491 F.2d 708 (8th Cir. 1973), the case was by agreement tried to the court solely on the issue of damages.

The trial court assessed damages at $19,000 and entered judgment for that amount less the workmen's compensation benefits offset. The plaintiff appeals, contending that there was a clear abuse of discretion by the trial court in granting a partial remittitur of the jury's verdict.[2] The defendant, Martin K. Eby Construction Co., cross-appeals, contending that the District Court lacked admiralty and Jones Act jurisdiction because Slatton was neither a seaman nor a crew member of a vessel in navigation at the time of his injury.

The plaintiff, a 32-year-old welder, sprained his lower back on May 16, 1972, when he and a coworker were attempting to move by hand a heavy (300-400 pound) piece of 12 inch diameter metal pipe across the deck of a floating work barge moored to a bank of the Arkansas River. The barge, 20 by 46 feet in size, was also secured to a "template," a temporary circu-

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[1] The Honorable J. Smith Henley, Chief Judge of the United States District Court for the Eastern District of Arkansas.

[2] The grant of a new trial is reviewable on appeal after the judgment is entered in the second trial. As noted in *Altrichter v. Shell Oil Co.*, 263 F.2d 377, 379 (8th Cir. 1959), the "ruling on this motion [for a new trial in the first case], in the circumstances here present, presented a question of law reviewable on this appeal. If this ruling of the court constituted error as a matter of law, then plaintiff would be entitled on this appeal to have the original verdict and judgment returned and entered on the first trial of the case restored."

lar working platform made of steel, utilized in constructing a "dolphin." A dolphin is a permanent river structure to which vessels can be moored. The plaintiff and his coworker would cut lengths of metal pipe to be used in constructing the dolphin. These would then be moved from the barge to the template encircling the dolphin. On prior occasions a crane had been used to move the pipes from the barge to the template. No crane was available on May 16, and the employees attempted to transfer the pipe manually, one pulling while plaintiff pushed or scooted the pipe across the deck of the flat work barge. Halfway to the template, the plaintiff felt a sharp pain in his back and became numb in his extremities.

He spent a day in the hospital and then returned home. After a day at home he was readmitted to the hospital for a few days of therapy and traction. No surgery was performed and the medical testimony concerning the injury, its permanency, and the prognosis for recovery were in sharp contrast. Aside from two attempts at light work with his former employer, he did no work from the summer of 1972 until about three weeks before the case was tried in October of 1973 when he finally took a job driving and parking automobiles at about half of his former income.

The plaintiff testified about recurring pain and inability to do heavy work. Neurological tests failed to reveal a ruptured disc or a tendon injury. An electromyographic study secured by plaintiff's doctor showed the plaintiff was basically normal with some "very mild changes" in his left tibial nerve. Another specialist secured by plaintiff's doctor performed a myelographic study in an attempt to determine whether or not the plaintiff had a ruptured or bulging disc in his lower back. The myelograph disclosed no abnormality or irregularity along the spinal canal and the specialist testified that his examination was completely negative. The plaintiff's physician, Dr. Rooney, thought he might possibly have a ruptured disc, but that if he did have

one, it was healed by February 23, 1973. Dr. Rooney had released the plaintiff for light work within a month of the accident.

The trial court, in ordering the remittitur, found the jury's verdict to be "grossly and shockingly excessive" in light of the evidence.[3] Plaintiff contends that this action was an abuse of discretion. The first question we must consider is the extent of our review of the action of a trial court in requiring a remittitur as a condition for denying a motion for new trial. Defendant asserts that decisions of this circuit indicate we will only reverse such an action of a district court when there has been a "plain injustice" or a "monstrous" or "shocking" result.

We have indicated that this is the standard we apply for review of the refusal of the trial court to set aside a jury verdict on the grounds of excessiveness or inadequacy. As stated by Judge Blackmun, now Mr. Justice Blackmun, in *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 447-48 (8th Cir.), *cert. denied*, 368 U.S. 929 (1961):

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[3] In its review of the verdict on Eby's motion for substantial remittitur the District Court stated:

> There is no question that plaintiff sustained an injury to his back, and the Court thinks that the jury could properly find, as it obviously did find, that the injury was permanent, and that plaintiff is going to have some difficulty with his back in the future and has sustained some diminution of his ability to work and earn money in the future.
>
> But the Court is forced to agree with defense counsel that the jury's verdict was grossly and shockingly excessive in the light of the evidence even after the defendant is allowed credit for the workmen's compensation that plaintiff has received.
>
> Personally, the Court thinks that an award within the range of $15,000 to $20,000 would have been fair and reasonable compensation to plaintiff, but the Court recognizes that the amount to be awarded in a case of this kind rests largely in the discretion of the jury. The Court thinks that the jury might have been justified under the evidence in awarding plaintiff as much as $50,000, but that any award in excess of that sum would have been so grossly excessive as to shock the conscience of the Court.

> [W]e shall continue to consider review, as we have said before, not routinely and in every case, but only in those rare situations where we are pressed to conclude that there is "plain injustice" or a "monstrous" or "shocking" result.

Whether this in fact is a different standard than the abuse of discretion standard applied by other courts of appeals, as argued by defendant, is subject to some doubt, for as Judge Blackmun went on to say in *Solomon, supra* at 447-48:

> Perhaps this is saying nothing more and nothing different than what the other courts of appeals have said in varying language. Perhaps in practice this court has observed a somewhat tighter standard than the others. In any event we still adhere to it.

(Footnote omitted.)

But whatever view may be taken of our standard for review of a trial court's action in refusing to overturn a jury award is not dispositive of the question before us in this case. Here we are not confronted on review with a jury determination as to a particular measure of damages buttressed by the conclusion of the trial court, who had the benefit of hearing the testimony and observing the demeanor of the witnesses, that the verdict should stand. When confronted with the concurrence of these two factors "an appellate court should be certain indeed that the award is contrary to all reason before it orders a remittitur or a new trial." *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 148 (D.C. Cir.), *cert. denied* 396 U.S. 835 (1969).

The situation presented by the present case requires an assessment of opposing considerations. A jury, upon consideration of the evidence, has awarded one quantum of damages. The trial court, upon his review of the evidence on the motion for new trial[4] has determined that the damages were excessive,

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[4] In its review of the evidence when passing upon a motion for new trial, the trial court is not limited to viewing the evidence in the

in fact "grossly and shockingly excessive." We are always mindful that the primary judge of the facts is the jury, and that its decision on the facts deserves great weight. Opposed to this in the present case is the decision of the trial court that the jury's award is excessive. We have traditionally given trial judges a large range of discretion in ruling on motions for new trial, particularly on the weight of the evidence, in recognition of the fact that they have heard the testimony and observed demeanor of the witnesses and are more aware of the community and its standards. *Solomon Dehydrating Co. v. Guyton, supra* at 447. Further, it is settled that the action of the trial court in setting aside a jury verdict is not in derogation of the right to trial by jury, "but is one of the historic safeguards of that right." *Altrichter v. Shell Oil Co.*, 263 F.2d 377, 380 (8th Cir. 1959), *quoting Aetna Casualty & Surety Co. v. Yeatts*, 122 F. 2d 350, 353 (4th Cir. 1941).

The issue presented as to the standard of review of a remittitur ordered as a condition of denying a new trial motion is one of first impression in this circuit. We have carefully considered the competing considerations mentioned above and the decision in *Gorsalitz v. Olin Mathieson Chemical Co.*, 429 F. 2d 1033 (5th Cir. 1970), where the same issue was presented for decision. We conclude that the standard we will apply in determining whether there was an abuse of discretion in ordering the remittitur is whether the remittitur was ordered for an amount less than the jury could reasonably find. *Gorsalitz v. Olin Mathieson Chemical Co.*, 456 F.2d 180 (5th Cir. 1972). *Cf. Taylor v. Washington Terminal Co., supra* at 148:

> In this jurisdiction particularly, District Court judges have given great weight to jury verdicts. They have stated

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light most favorable to the prevailing party. It may weigh evidence, disbelieve witnesses, and grant a new trial even when there is substantial evidence to sustain the verdict. *Bates v. Hensley*, 414 F.2d 1006, 1011 (8th Cir. 1969); *Altrichter v. Shell Oil Co., supra* at 380.

> that a new trial motion will not be granted unless the "verdict is so unreasonably high as to result in a miscarriage of justice," or, most recently, unless the verdict is "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate."
>
> At the appellate level, in reviewing a trial judge's grant of a new trial for excessive verdict, we should not apply the same standard. The trial judge's view that a verdict is outside the proper range deserves considerable deference. His exercise of discretion in granting the motion is reviewable only for abuse. Thus we will reverse the grant of a new trial for excessive verdict only where the quantum of damages found by the jury was *clearly* within "the maximum limit of a reasonable range."

(Emphasis in original.)

The trial court's determination of a reasonable limit to the jury award will be given considerable deference in our review.

In applying that standard to the facts of this case, we find no abuse of discretion on the part of the trial court. The trial court found the verdict to be "grossly and shockingly excessive." Our review convinces us that the trial court was justified in determining that $50,000 was the maximum limit justifiable under the evidence.

It is also clear from the District Court's statement in ordering the remittitur that it gave proper consideration to the jury's role in assessing damages. See n. 3, *supra*. The court's statement indicates that in ordering the remittitur it was allowing the maximum limit sustainable on a jury verdict even though it thought that $15,000 to $20,000 was fair and reasonable compensation.

In summation, we reiterate what was stated in *Solomon, supra* at 447, "that in our opinion, inadequacy or excessiveness of a

verdict is basically, and should be, a matter for the trial court * * *." We will not disturb its action on appeal absent a clear abuse of discretion. No clear abuse of discretion is shown here.

We turn now to the issue of subject matter jurisdiction raised by defendant. The defendant challenges the admiralty and maritime jurisdiction of the court by denying that plaintiff was a seaman or a crew member of a vessel of the defendant at the time of his injury. The defendant views plaintiff's exclusive remedy as either Arkansas workmen's compensation benefits or under the federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, since the accident occurred upon navigable waters.

The Jones Act[5] is an expansion of the common law admiralty jurisdiction under Congress' Commerce and Necessary and Proper Clause powers. U.S. Const. art. I, § 8; *Swanson v. Marra Brothers*, 328 U.S. 1, 5 (1946); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 39 (1943). The defendant points to *Atkins v. Greenville Shipbuilding Corp.*, 411 F.2d 279 (5th Cir.), *cert. denied*, 396 U.S. 846 (1969), as excluding from the definition of "vessel" in navigation and consequent admiralty jurisdiction floating dry docks and inland construction barges which have no navigational crews nor motive power of their own. In *Atkins* the court affirmed a summary judgment denying subject matter jurisdiction over an unseaworthiness claim by a shorebased welder injured on a floating dry dock. The court noted that the dry dock was moored in the exact position where it was constructed and that it was neither designed nor used for transportation.

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[5] The Act states in relevant part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply * * *.

46 U.S.C. § 688.

The Fifth Circuit reached a similar decision in *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999 (5th Cir.), *cert. denied*, 414 U.S. 868 (1973), in holding that a floating platform moored in navigable waters, secured to a dock by ropes and functioning only as a stationary construction platform not designed for transportation, was not a "vessel" for purposes of general maritime or Jones Act jurisdiction. The defendant here analogizes that its floating barge, moored to the bank and the template, was nothing more than a floating stage and not a vessel in navigation as a matter of law.

However, what is a vessel and who is a crew member are ordinarily jury questions. *Offshore Company v. Robison*, 266 F.2d 769, 780 (5th Cir. 1959). The issue of whether the barge was a vessel within the meaning of the law and whether the plaintiff was a member of a crew of that vessel at the time he was injured was submitted to the jury for its determination. The District Court in its memorandum opinion summarized the jury's verdict as finding that the plaintiff was injured in the course of his employment on a barge which was a vessel within the meaning of the law, that the plaintiff was a member of the crew of that vessel at the time he was injured, and that the injury was proximately caused by the defendant's negligence or by unseaworthiness of the barge or by both negligence and unseaworthiness.

Here the barge was in navigable waters and the men were working on a maritime installation. Part of plaintiff's work was on the barge itself in connection with his other duties constructing the dolphin. There appears to be a sufficient nexus between the plaintiff's work on the floating barge and the installation of the maritime dolphin structure to merit submitting the issue to the jury. In light of the record, we cannot say as a matter of law that the jury's verdict was legally erroneous. The jury can approve Jones Act coverage if there is evidence that (1) the injured workman performed at least a substantial part of his work on the vessel (virtually any floating structure used for trans-

port in navigable waters) and (2) the capacity in which he was employed and duties which he performed contributed to the function of the vessel or to the accomplishment of its mission. *Offshore Company v. Robison, supra* at 779.[6]

The facts of this case fall within the marginal area of Jones Act or maritime jurisdiction. However, since we believe the issues were properly submitted to the jury, we are not prepared to hold as a matter of law that the barge in question was not a vessel or that the plaintiff was not a crew member within the liberal definition of those terms under the Jones Act or the admiralty doctrine of unseaworthiness. As an appellate court, we must view the evidence in the light most favorable to sustaining the jury's verdict, and we accept as established all reasonable inferences which tend to support the jury's determination. We therefore find no error in the court's refusal to direct a verdict for the defendant.

The judgment of the District Court is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[6] Although the defendant also relies on *Rotolo v. Halliburton* Co., 317 F.2d 9 (5th Cir.), *cert. denied*, 375 U.S. 852 (1963), and *Powers v. Bethlehem Steel Corp.*, 477 F.2d 643 (1st Cir.), *cert. denied*, 414 U.S. 856 (1973), we agree with the courts deciding those cases that their circumstances did not meet the *Offshore* standard stated here.

EXHIBIT B

In the United States District Court
Eastern District of Arkansas
Western Division

Max Slatton, Jr.,
Plaintiff,
v.
Martin K. Eby Construction Co., d/b/a Eby and Associates of Arkansas,
Defendant.
LR-72-C-201.

Memorandum and Order

(Filed in U. S. District Court November 28, 1973)

This admiralty case is now before the Court on the post trial motion of the defendant for judgment notwithstanding the verdict of the jury or, alternatively, for a new trial. The motion has been submitted on the record and full memorandum briefs filed by respective counsel.

The historical facts in the case are not in dispute. On May 16, 1972, plaintiff, Max Slatton, Jr., was employed as a welder by the defendant, Martin K. Eby Construction Co., d/b/a Eby and Associates of Arkansas, and he was working on a floating barge which was being used in the course of construction work in which the defendant was engaged on the Arkansas River near the cities of Little Rock and North Little Rock, Arkansas. On the date just mentioned plaintiff sustained an injury to his back while he and a fellow employee were undertaking to manually move some lengths of large pipe. At the time of his

injury plaintiff was covered by the Arkansas workmen's compensation statute and was paid benefits under that statute amounting to $1,732.96.

Plaintiff brought this action under the Jones Act, 46 U.S.C.A., section 788, alleging that he was a member of the crew of the barge on which he was working at the time of his injury, and that his injury was proximately caused by negligence on the part of the defendant. He also alleged that the barge was unseaworthy in that it did not have an adequate crew and equipment properly to perform the mission on which it was engaged.

In its pleadings the defendant denied liability. It took the position that the barge in question was not a "vessel," and that plaintiff was not a seaman or the member of the crew of any vessel at the time of his injury. The defendant also denied plaintiff's charges of negligence and unseaworthiness and took vigorous issue with the plaintiff as to the extent of his injury.

The case was tried to a jury. At the conclusion of plaintiff's evidence and again at the conclusion of all the evidence the defendant moved for a directed verdict. Ruling on those motions was reserved, and the case was submitted to the jury which returned a verdict in favor of the plaintiff in the sum of $85,000.

On October 26, 1973, the Court filed a "Memorandum Opinion and Final Judgment" in favor of the plaintiff, and in that connection finally overruled the motions for directed verdict that had been made by the defendant in the course of the trial. The Court stated that implicit in the jury's verdict were findings that plaintiff was injured while working within the scope of his employment, that the barge on which plaintiff was working was a vessel, that at the time of his injury plaintiff was a member of the crew of the vessel, and that his injury was proximately caused by negligence on the part of the defendant or by unseaworthiness of the vessel or by both negligence and unseaworthiness. The Court found that the findings of the jury

were supported by substantial evidence. The Court also found that defendant's claim for limitation of liability under 46 U.S.C.A., section 183(a) should be rejected.

In determining the amount of the judgment to be entered the Court allowed credit for the amount that plaintiff had received by way of workmen's compensation and entered judgment in the net sum of $83,267.04 together with the cost of the action.

The motion now before the Court was timely filed on October 29, 1973.

The Court adheres to its view that plaintiff made a submissible case, and that the findings of the jury on the liability issues in the case were supported by substantial evidence. Hence, the basic prayer of the defendant for entry of a judgment in its favor notwithstanding the verdict will be, and it hereby is, Denied.

It is now necessary to consider the alternative prayers of the defendant which are for a full or partial new trial or for a substantial remittitur. Counsel for the defendant argues that the jury's verdict was against the weight of the evidence on the "seaman-member-of-the-crew" issue; that the verdict amounted to a miscarriage of justice, shocking to the conscience, and grossly excessive; and that it was error to submit to the jury the question of the permanency of plaintiff's injury.

The only one of those arguments that gives the Court any trouble is that the verdict was grossly excessive. There is no question that plaintiff sustained an injury to his back, and the Court thinks that the jury could properly find, as it obviously did find, that the injury was permanent, and that plaintiff is going to have some difficulty with his back in the future and has sustained some diminution of his ability to work and earn money in the future.

But, the Court is forced to agree with defense counsel that the jury's verdict was grossly and shockingly excessive in the

light of the evidence even after the defendant is allowed credit for the workmen's compensation that plaintiff has received.

Personally, the Court thinks that an award within the range of $15,000 to $20,000 would have been fair and reasonable compensation to plaintiff, but the Court recognizes that the amount to be awarded in a case of this kind rests largely in the discretion of the jury. The Court thinks that the jury might have been justified under the evidence in awarding plaintiff as much as $50,000, but that any award in excess of that sum would have been so grossly excessive as to shock the conscience of the Court.

In view of what has been said it is Ordered that if the plaintiff within the next 20 days enters a remittitur in the amount of $33,267.04 defendant's alternative motion for a full or partial new trial will be denied. If the remittitur is not entered within that period of time, the Court's judgment will be set aside and a new trial ordered on the issue of damages only.

Dated this 28th day of November, 1973.

(S) J. SMITH HENLEY
United States District Judge

EXHIBIT C

In the United States District Court, Eastern District of Arkansas, Western Division

Max Slatton, Jr.,
Plaintiff,
v.
Martin K. Eby Construction Co., dba Eby and Associates of Arkansas,
Defendant.
LR-72-C-201

Memorandum Opinion

(Filed April 10, 1974)

This suit in admiralty which arises out of an accident that occurred on a barge on the Arkansas River near Little Rock, Arkansas, on May 16, 1972, was commenced in this Court on September 19, 1972. The case was tried to a jury in mid-October 1973, and the jury returned a verdict in favor of the plaintiff in the sum of $85.00.

Judgment on the verdict was entered. However, defendant moved for the entry of a judgment notwithstanding the verdict or, in the alternative, for a new trial. On November 28, 1973, the Court filed a Memorandum and Order dealing with defendant's post-trial motion. In its opinion the Court rejected the basic contentions of the defendant, but found that the jury's verdict was grossly excessive. The Court expressed the view that an award "within the range of $15,000 to $20,000 would have been fair and reasonable compensation to plaintiff." However, the Court recognized that the amount to be awarded in a case of this kind rests largely in the discretion of the jury.

The Court held ultimately that unless plaintiff entered a remittitur in an amount sufficient to bring the judgment down to $50,000, a new trial on the issue of damages only would be ordered.

The plaintiff declined to enter the remittitur and, instead, sought to take an interlocutory appeal to the Court of Appeals for the Eighth Circuit under the provisions of 28 U.S.C.A., section 1292(a)(3). The Court of Appeals held that the Court's order in connection with the remittitur was not appealable and dismissed the appeal. Slatton v. Martin K. Eby Construction Co., 8 Cir., 1974, ... F. 2d ....

The order of the Court of Appeals dismissing the appeal and remanding the case for further proceedings was filed in the office of the Clerk of this Court on March 8, 1974. Thereafter counsel on both sides agreed that the question of damages should be submitted to the Court for determination on the basis of the record made at the original trial, and the Court has been supplied with a copy of the Appendix that plaintiff filed in the Court of Appeals. That Appendix contains all of the evidence relevant to the question of damages. That evidence consists of the testimony of the plaintiff and of the following witnesses: Dr. Thomas Rooney, an orthopedic surgeon who practices in North Little Rock and who treated plaintiff for his injury; Dr. Robert Watson, a Little Rock neurosurgeon, who examined plaintiff on two occasions at the instance of the defendant and who testified as an expert witness for the defense; Dr. Clyde Glover, a North Little Rock radiologist who made and evaluated, along with Dr. Rooney, certain X-ray films of plaintiff's lower back, and who testified under subpoena as a defense witness; Billy H. Dunn, an employee of the Arkansas Employment Security Division who undertook to find plaintiff a job in September 1973, and who was able to place him with the Moore Ford Co. of North Little Rock.

The Court has considered the evidence de novo, and is unable to find from it that plaintiff's injury was so severe or serious as to warrant an award outside the range mentioned in the Court's opinion of November 28, 1973.[1]

The historical facts relating to plaintiff's injury and present condition are not in dispute.

Plaintiff is a white male who was 31 years of age in the spring of 1972; he has an eighth grade education and is a certified welder. On May 16, 1972, he and a fellow employee of the defendant were undertaking to move certain heavy pipe by hand.[2] As the work proceeded, plaintiff sustained severe and temporarily incapacitating pain in his lower back which prostrated him. He was taken to Memorial Hospital in North Little Rock and was seen by Dr. Rooney in the emergency room. He was seen by Dr. Rooney in his office the next day, and thereafter he was hospitalized for several days and treated for his condition. When he was released from the hospital he was given certain medication, principally a muscle relaxant; that medication was discontinued in July 1972, and plaintiff was given a back brace. Both before and after the discontinuance of the medication in July plaintiff saw Dr. Rooney frequently and was examined by him; Dr. Rooney administered certain recognized neurologist tests and evoked some symptoms, most of which were subjective.

During the early summer of 1972 petitioner tried to do some light work for the defendants, but he testified that because of

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[1] The present submission of the issue of damages to the Court on the basis of the record made at the jury trial was at the suggestion of counsel for plaintiff who were aware of what the Court had said about damages in its November opinion.

[2] On previous occasions similar pipe had been moved by means of a crane, and the jury's finding of liability was evidently based in whole or in part on the failure of the defendant to provide a crane on the day on which plaintiff was injured.

pain in his back and legs he was unable to perform the tasks assigned to him.

In August 1972 plaintiff was again admitted to the hospital where he remained for several days. A myelogram was performed and in that connection X-ray pictures of plaintiff's lower back were made by Dr. Glover working in conjunction with Dr. Rooney.

On the basis of his numerous examinations of the plaintiff and his interpretation of the X-rays, Dr. Rooney made a diagnosis of a herniated disc between the fourth and fifth lumbar vertebrae. Surgery was discussed with plaintiff, and apparently an operation was scheduled. However, plaintiff turned out to be unwilling to submit to the operation and it was cancelled. Dr. Rooney did not insist upon the surgery because he did not think plaintiff's situation was such as to make surgery mandatory.

Plaintiff did not work the time of his release from the hospital in late August 1972 until late September 1973, and during that period he made no effort to find work. As stated, the suit was filed in September 1972.

In August 1973 plaintiff was examined on two occasions by Dr. Watson. In addition to examining plaintiff personally Dr. Watson considered the X-ray films that had been made the preceding year.

Around September 27, 1973, plaintiff contacted Mr. Dunn of the Employment Security Division seeking light work. He related to Mr. Dunn that he had a back problem, and that information was relayed by Mr. Dunn to prospective employers, three of whom declined to employ plaintiff because of what they supposed to be a back condition that would render his employment risky. Moore Ford Co. employed plaintiff in a job moving cars around the company premises. That job pays, ac-

cording to plaintiff, from $90 to $100 per week. Plaintiff also testified that while he was working as a welder, he earned $200 per week.

The Court has no difficulty in finding that plaintiff is entitled to compensation for the physical pain that he has endured down to the time of trial and for his medical and hospital expenses, which expenses amount in round numbers to $1400. The Court also finds that plaintiff is entitled to lost earnings to the extent that the loss may be reasonably attributed to his injury.

The Court further finds that plaintiff may very well have some trouble with his back in the future and will endure some pain and discomfort in the future on account of injury. But the Court does not find that plaintiff has suffered any permanent disability or that his capacity for earning money has been substantially impaired by his injury.

Dr. Rooney's diagnosis of a herniated disc is of doubtful validity in view of the paucity of objective symptoms commented upon by both Dr. Watson and Dr. Glover and for other reasons developed during the cross-examination of Dr. Rooney and in the course of the testimony of the other two doctors. Moreover, Dr. Rooney himself was by no means certain in his testimony about plaintiff's future outlook. He thinks that plaintiff will probably have some trouble with his back, but he does not know "how much it will bother him, or if it will bother him forever." And that is as far as Dr. Rooney appears to be willing to go. He did not testify in terms that plaintiff has any "permanent disability," and he did not attempt to measure any future disability in terms of percentage or otherwise.

While the Court does not feel that criticism of the plaintiff as a conscious malinger would be justified, the Court cannot overlook the fact that during most of the period of time covered by the record in this case plaintiff had this suit pending, and its pendency and the hope of a large award may very well

have affected adversely his motivation to return to his old trade or to find other remunerative employment.

Mention has been made of the fact that plaintiff's medical and hospital expenses amounted to about $1400, and the Court thinks that it would be fair to add another $100 to that figure to take care of small items with respect to which plaintiff may not have kept any record. So $1500 will be allowed for expenses.

Turning now to the question of lost earnings, the Court is not willing to compensate plaintiff at the rate of $200 per week from the date of his injury down to the time at which he went to work for Moore Ford Co. in late September or very early October 1973. As the Court figures it, that period includes approximately 72 work weeks, and an award on the basis of $200 per week would amount to $14,400. The Court thinks that had plaintiff made a reasonable effort to do so, he could have mitigated his loss of wages very substantially, and the Court is not willing to award him more than $7,500 for that item. The Court has found that plaintiff has endured physical pain and suffering on account of his injury for which he should be compensated, and the Court is willing to make some compensation for the pain that plaintiff is likely to suffer in the future. An award for pain and suffering cannot be measured by any objective yardstick, and the Court feels that $10,000 will be fair and reasonable compensation for plaintiff's past, present, and future pain and suffering.

To summarize: The Court will allow $1,500 for medical and hospital expenses, $7,500 for lost earnings, and $10,000 for pain and suffering. Let judgment in the amount of $19,000 be entered.

Dated this 10th day of April, 1974.

/s/ J. SMITH HENLEY
United States District Judge

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1010

MAX SLATTON, JR.,
Petitioner,

v.

MARTIN K. EBY CONSTRUCTION COMPANY, INC. d/b/a
EBY & ASSOCIATES OF ARKANSAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

Martin K. Eby Construction Company, Inc. d/b/a Eby & Associates of Arkansas

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ORDER GRANTING EXTENSION OF TIME

Respondents request of February 28, 1975 for an extension of time within which to file a response to the Petition for a Writ of Certiorari was granted and the time for filing a response was extended to and including April 2, 1975.

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IN THE

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Martin K. Eby Construction Company, Inc. d/b/a Eby & Associates of Arkansas

OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Arkansas, Western Division, are unreported. The opinions of the Court of Appeals are reported at 491 F.2d 707 and 506 F.2d 505. The unreported opinions are set forth in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The Petition of Writ of Certiorari invokes this Court's jurisdiction under 28 USC § 1254(1), even though the Courts below adopted the rule of law favorable to petitioner and none of the considerations enumerated in Rule 19 of the Rules of the United States Supreme Court are presented in this case.

QUESTION PRESENTED

Did the trial judge clearly abuse his discretion in granting a partial new trial on the issue of damages only unless petitioner accepted a $33,267.04 remittitur of the jury's $85,000.00 verdict?

STATEMENT OF THE CASE

After a jury trial in which the Jones Act, unseaworthiness, and damages issues were submitted to the jury in a general verdict form, petitioner was awarded a net judgment, after workmen's compensation payments were credited, of $83,-267.04. By memorandum Order filed November 28, 1973, the District Court, after denying other motions of respondent, found that the amount of the jury verdict was "grossly and shockingly excessive in light of the evidence" on damages and ordered in the alternative, a remittitur o a new trial on damages:

> "Personally, the Court thinks that an award within the range of $15,000 to $20,000 would have been fair and reasonable compensation to plaintiff, but the Court recognizes that the amount to be awarded in a case of this kind rests largely in the discretion of the jury. The Court thinks that the jury might have been justified under the evidence in awarding plaintiff as much as $50,000, but that

any award in excess of that sum would have been so grossly excessive as to shock the conscience of the Court.

"In view of what has been said it is Ordered that if the plaintiff within the next 20 days enters a remittitur in the amount of $33,267.04 defendant's alternative motion for a full or partial new trial will be denied. If the remittitur is not entered within that period of time, the Court's judgment will be set aside and a new trial ordered on the issue of damages only." (A. 14, 17).[1]

Thereafter, petitioner decided not to accept the remittitur and filed an immediate appeal. The United States Court of Appeals for the Eighth Circuit held that the District Court's new trial order was not appealable and denied the petitioner's appeal. *Slatton v. Martin K. Eby Construction Co., Inc.*, 491 F.2d 707 (8th Cir. 1974). After remand of the suit for further proceedings consistent with the District Court's order granting a new trial on the damage issue, the *petitioner* requested a trial to the Court without a jury on the basis of the damage evidence adduced in the first trial. The respondent joined in this request. In the second trial, the Court, sitting non-jury, reviewed all of the evidence pertaining to damages previously received in the first trial and entered its memorandum opinion on April 10, 1973 (Supp. A. 3). The Court allowed a recovery and judgment to be entered in the total amount of $17,267.04 after a credit for workmen's compensation benefits previously paid the petitioner by respondent.

Subsequently, a second appeal was taken by the petitioner from the final judgment entered after the second trial to the

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[1] Record references to the three printed volumes of the appendices utilized in connection with the appeal to the Court of Appeals are referred to as follows in order to avoid confusion:

"A."—Appendix (Petitioner)

"Supp.A."—Supplemental Appendix (Petitioner)

"Eby Supp.A."—Supplemental Appendix of Martin K. Eby Construction Company, Inc.

District Court on damages. In *Slatton v. Martin K. Eby Construction Co., Inc.* 506 F.2d 505 (8th Cir. 1974), the Court of Appeals affirmed the District Court's order entered upon the respondent's motion for a new trial and remittitur which granted a $33,267.04 remittitur and reduced the jury verdict in the first trial to $50,000.00.

REASON FOR DENYING CERTIORARI

The writ of certiorari should not be granted since none of the considerations of Rule 19 of the Rules of the United States Supreme Court are present in this case and nothing more is involved than questions of facts that have been resolved against petitioner both by the Trial Court and the Court of Appeals for the Eighth Circuit. In its decision in *Slatton v. Martin K. Eby Construction Co.*, 506 F.2d 505, 508 (8th Cir. 1974), the Court of Appeals adopted the appellate standard for review of a remittitur granted by a trial court that was more favorable to petitioner and distinguished its prior ruling in *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439 (8th Cir. 1961), as not entirely dispositive of the remittitur issue presented in the instant case. In *Solomon*, Mr. Justice Blackmun (then Judge Blackmun) had held that the grant or denial of a motion for a new trial for excessive damages was basically a matter for the trial court with review granted only in rare situations where there was plain injustice or a monstrous or shocking result. In the instant case, the Court of Appeals in its opinion seemed to limit *Solomon's* rationale to those cases where review is sought of a trial court's refusal to set aside a jury award. The situation presented in the present case where the jury awarded one quantum of damages and the trial court determined that the damages were excessive was said to present opposing considerations that were, perhaps, not entirely governed by the *Solomon* rationale. *Slatton v. Martin K. Eby Construction Co.*, 506 F.2d 505, 508 (8th Cir. 1974).

The Court of Appeals recognized and considered both the rule that the decision of the jury on the facts deserves great weight and the rule of *Altrichter v. Shell Oil Co.*, 263 F.2d 377 (8th Cir. 1959), that a trial in passing on a motion for new trial is not limited to viewing the evidence in the light most favorable to the prevailing party but may weigh evidence,

disbelieve witnesses, and grant a new trial even when there is substantial evidence to sustain the verdict. *Cf.* 6A Moore, Federal Practice ¶ 59.08[5]. The Court of Appeals reiterated the principle that the action of a trial court in setting aside a jury verdict is not in derogation of the right to trial by jury but an historic safeguard of the right to trial by jury. This view is in accord with the decision of this Court in *Dimick v. Schiedt*, 293 U.S. 474 (1935), which held that the use of remittitur to correct the error of a jury in arriving at a manifestly unjust verdict was not precluded by the Seventh Amendment since the scope and the meaning of that amendment are determined by "the appropriate rules of the common law established at the time of adoption of that constitutional provision in 1791." 293 U.S. at 476. In reconciling remittitur with the Seventh Amendment, this Court stated in *Dimick, supra*, at 486:

> "The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts. In dealing with questions like the one now under consideration, that distinction must be borne steadily in mind. When the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact. Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess,—in that sense that it has been found by the jury,—and that the remittitur has the effect of merely lopping off an excrescence."

In distinguishing the situation of a grant of a new trial without remittitur, the Court of Appeals pointed out that the issue presented as to the standard of review of a remittitur awarded as a condition of denying a new trial was of first impression in the Eighth Circuit. *Slatton v. Martin K. Eby Construction Co.*, 506 F.2d 505, 508 (8th Cir. 1974). The Court of Appeals adopted the ruling of *Gorsalitz v. Olin Mathieson Chemical Co.*, 456 F.2d 180 (5th Cir. 1972), which held that in determining whether there was a clear abuse of discretion by the trial court in ordering a remittitur, the reviewing standard of the appellate court is whether the remittitur was ordered for an amount less than the jury could reasonably find. *Slatton v. Martin K. Eby Construction Co.*, 506 F.2d 505, 508-509 (8th Cir. 1974). And, this Court has recognized that a trial court has broad discretion in granting a new trial conditioned upon the acceptance of a remittitur when this action of the trial court was not without support in the record. *Neese v. Southern Ry. Co.*, 350 U.S. 77 (1955). Both the United States Court of Appeals for the Eighth Circuit in the present case and the Fifth Circuit in *Gorsalitz* relied on the following language of *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 149 (D.C. Cir. 1969), in determining whether a trial court erred in granting a remittitur:

> "The trial judge's view that a verdict is outside the proper range deserves considerable deference. His exercise of discretion in granting the motion is reviewable only for abuse. Thus we will reverse the grant of a new trial for excessive verdict only where the quantum of damages found by the jury was clearly within 'the maximum limit of a reasonable range.' "

The Court of Appeals noted that the trial court, in granting the remittitur, did not substitute its own view of the damages which was in the $15,000 to $20,000 range but ordered a remittitur of only the excrescence of the jury's verdict above $50,000 which was the maximum amount of damages that it felt in

the exercise of its sound discretion that the evidence would reasonably support. *Slatton v. Martin K. Eby Construction Co.*, 506 F.2d 505, 509 (8th Cir. 1974).

Petitioner's ostensible reason advanced for granting his petition for certiorari is that the Court of Appeals did not draw from the damage evidence the factual inferences which he urges and, therefore, the Court of Appeals should have reversed the trial judge's ruling for a clear abuse of discretion. Such an argument is neither within the consideration of Rule 19 of the Supreme Court Rules nor raises legal issues of such national scope or importance that the writ of certiorari should be granted.

The categories of damage evidence which the petitioner argues are in support of his petition are the same as presented to both of the lower Courts. It is obvious that the District Court and the Court of Appeals did not agree with the petitioner's version of the factual inferences to be drawn from the damage evidence. In analyzing the facts presented, it should be remembered that the remittitur of $33,267.04 gave petitioner a verdict of $50,000.00 which he voluntarily declined to accept, presumably in the hope that upon retrial he could recover more than this amount. Moreover, the District Court did not deprive him of his right to a jury trial on the issue of damages. After declining to accept the $50,000.00 remitted verdict which was the maximum verdict that the District Court felt the evidence presented to the jury would reasonably support, the petitioner chose not to retry the damage issue to a jury but to submit this question to the Court for decision without offering any additional medical evidence on the doubtful issue of the alleged permanency of the petitioner's injury.

Wages Lost: It is true that petitioner was off work from the date of the accident on May 6, 1972 until September 27, 1973 and that he worked at a lesser rate of pay between September 27, 1973, shortly before the trial until the trial date on October

16-17, 1973. It is also true that petitioner's doctor who treated petitioner the day of the accident released him from the hospital that same day with a diagnosis of acute low back sprain (A. 20). The petitioner was also cleared by his treating physician for return to light work in June, 1972 (A. 22), and he was released from medical supervision completely for return to work as of August 21, 1973 (A. 43). While the petitioner testified that he was unable to perform the non-welding duties assigned to him by the respondent upon his return to light duty approximately one month after the accident (A. 77), there is no dispute that the petitioner did not try to obtain any other employment with other employers consistent with Dr. Rooney's recommendations until September 27, 1973, which was after the parties had been notified that the case had been set for trial (A. 82-83). Petitioner testified that after his attempt to perform light duties for respondent, he spent his time doing nothing but staying home and watching television for about four and one-half months prior to the taking of his discovery deposition in August, 1973 (A. 83).

In Judge Henley's Memorandum Opinion of April 10, 1974 (Supp. A. 3, 7), following retrial of the case non-jury, Judge Henley makes mention of the fact that the petitioner did not make a reasonable effort to seek employment consistent with his doctor's recommendations in mitigation of his damages following his release for light work until late September or early October, 1973, which was just before the October 16th jury trial. In determining the amount of damages the jury could reasonably find on the issue of actual lost wages to the date of trial, the trial court could not be said to have clearly abused his discretion by considering all of the facts relating to wage loss, including the absence of any effort by the petitioner to be gainfully employed consistent with his doctor's recommendations from the time of his release for light work in June, 1972, until shortly before the date of trial in October, 1973.

Medical Expenses: It was an undisputed fact that the petitioner's medical expenses were $1,390.94, which represents but a small part of petitioner's $50,000.00 verdict after remittitur. On retrial of the damage issue, the trial judge found petitioner's medical expenses to amount to $1,500.00 which was slightly more than the evidence on medical expenses would actually support. The amount of medical expenses gains significance in relation to the other evidence on damages when the medical treatment and reports which these expenses represent are considered. Dr. Rooney, the petitioner's treating doctor, examined the petitioner on the day of the accident and did not hospitalize him following conservative treatment in the emergency room (A. 34, 80). Dr. Rooney stated that the physical examination on the day of the accident included X-rays of the petitioner's lower back which were normal and negative in every respect and that the petitioner demonstrated a full range of motion in his lower back during this examination. Petitioner himself expressed only the subjective symptom of some moderate tenderness in his lower back before release from the hospital (A. 35). Dr. Rooney followed petitioner's course of continued improvement from office visit to office visit until petitioner was released completely to return to work on August 21, 1973, with the specific recommendation of Dr. Rooney that an operation was not warranted (A. 43). Dr. Rooney took petitioner off all medication by July 6, 1972, less than two months after the accident (A. 40). Petitioner incurred the diagnostic expense of several neurological tests during this period of time between July 6, 1972 and August 21, 1973. The majority of the objective tests performed during the office visits were either negative or showed only mild changes (A. 39-43). Dr. Rooney had another specialist perform an electromyographic study which was essentially normal and only showed some "very mild changes" in the petitioner's left tibial nerve (A. 41). At Dr. Rooney's request a third specialist, Dr. Clyde Glover, a radiologist (A. 57), performed a myelographic X-ray in the hospital to determine whether or not the petitioner had a ruptured or

bulging disc in his lower back. Dr. Glover testified that he observed no abnormality or irregularity whatsoever in the injected dye column along the spinal canal to suggest a ruptured or protruding disc at the L4-5 level of the petitioner's lower back (A. 60), and that his examination was completely negative (A. 61). Dr. Glover's report of the radiological examination contained his statement that the examination "did not reveal any definite abnormality" which meant, according to Dr. Glover, that there was no indication of any abnormality (A. 62-64). Petitioner spent a large portion of his medical expenses on diagnostic tests which were negative and not on actual treatment for his sprained lower back. In determining the amount of damages which the jury could reasonably find, the trial court could not be said to have clearly abused its discretion in granting the remittitur by considering all of the factors relating to medical expenses which included the lack of evidence of anticipated future medical expense as well as incurring much of his actual medical expense for diagnostic tests and office examinations rather than medical treatment for any residual symptoms of his injury.

Loss of Earning Capacity and Permanency of the Injury: While the trial court felt that a jury issue had been presented as to permanency of the injury and diminution of earning capacity (A. 16), it was not compelled in considering the new trial motion to ignore the countervailing evidence on these elements of damage in deciding whether a remittitur was proper. The revealing evidence on these elements of damages is best reflected by the following comments made by the trial judge after retrial of the case:

> "Moreover, Dr. Rooney himself was by no means certain in his testimony about plaintiff's future outlook. He thinks that plaintiff will probably have some trouble with his back, but he does not know 'how much it will bother him, or if it will bother him forever.' And that is as far

> as Dr. Rooney appears to be willing to go. *He did not testify in terms that plaintiff had any 'permanent disability,' and he did not attempt to measure any future disability in terms of percentage or otherwise.*" (Supp. A. 7; emphasis supplied).

In remitting the verdict to $50,000.00, the trial court was obviously still allowing substantial damages for permanency of the injury and diminution of earning capacity when in fact the petitioner's own evidence on these elements of damages was not substantial or convincing. It is apparent that the jury's verdict in the instant case included grossly excessive amounts for any loss of earning capacity and permanency of the injury. Under the meager evidence presented on these elements of damage, the trial court here was justified in ordering the remittitur because the jury verdict was not "*clearly* within the maximum limits of a *reasonable* range." *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 149 (D.C. Cir. 1969). (Emphasis added).

In addition to the trial court's observations, Dr. Rooney testified that as of his examination of August 21, 1973, the petitioner in his professional medical opinion "would be able to return to *full activity* at some time in the future." (A. 43; emphasis supplied).

Although petitioner set out medical testimony on page 7 of his Petition, the impression left by the reference to the June 27, 1972, August 8, 1972 and August 13, 1972 medical visits is somewhat misleading. After petitioner's initial visit which resulted in negative findings of any permanent injury, the petitioner was next seen by Dr. Rooney on May 29, 1972. All his findings in this examination were negative (A. 37-38). Dr. Rooney stated that petitioner's July 6, 1972, examination revealed a good range of motion and no positive neurological findings (A. 39). Petitioner's July 13, 1972 and July 24, 1972, examinations were also negative (A. 40). Petitioner's electromyo-

graphic study performed in August, 1972 reported "some very mild changes in the left tibial nerve" (A. 41). Apparently on this medical evidence, petitioner's doctor thought petitioner had some findings consistent with a herniated disc (A. 26). However, Dr. Rooney's opinion as a result of his February 22, 1973 examination is reflected by the following quotation from the record, not all of which is quoted in petitioner's brief, pages 7 and 8:

> "Q. Just briefly, in the examination on February 22, 1973 was the straight leg raising test still negative?
>
> A. Yes.
>
> Q. Was there any muscle spasm present?
>
> A. No.
>
> Q. Did he have normal motion in his lumbar spine?
>
> A. Yes.
>
> Q. Did he have any list at all in his lumbar spine?
>
> A. No.
>
> Q. Now, wouldn't all of these findings that you have just stated be objective findings that would be inconsistent with any presence of a ruptured disc at the L-4-5 level?
>
> A. Consistent with that alone? It would be consistent with a healed disc, too.
>
> Q. *Well, it could be consistent with no ruptured disc at all?*
>
> A. *Yes.*" (A. 42, Emphasis supplied)

Therefore, the petitioner's own medical witness testified that petitioner's medical findings showed either that petitioner's symptoms as of February 22, 1973, were indicative of a "healed disc injury" or no ruptured disc at all. Neither of these alterna-

tive diagnoses by petitioner's treating orthopedic specialist would support a finding of permanent injury and disability nor a substantial recovery for this element of damage. Petitioner was thereafter seen by Dr. Rooney on February 22, 1973, and there were no positive findings (A. 42, 43). Petitioner was released on August 21, 1973 to return to work and Dr. Rooney concluded that petitioner would be able to "return to full activity at some time in the future" (A. 43).

Dr. Watson, an eminently qualified neurological surgeon and past President of the Neurological Society of America, examined petitioner twice in August 1972 for the purpose of obtaining a current evaluation of his condition (A. 46, 47). He testified that the examinations were perfectly normal and indicated no intervertebial disc involvement at the time (A. 48). The X-ray studies Dr. Watson made showed no evidence of injury and were "just good, fine, healthy, normal appearing X-rays for a young, normal individual" (A. 48). During the course of his examination, Dr. Watson examined the results of the myelogram performed by Dr. Rooney and Dr. Glover and concluded that they "were fine, normal, healthy looking myelographic films, entirely within normal limits in every respect." (A. 49). Dr. Watson testified that if a person had a continuing intervertebral disc pathology over a period of 15 months "one could certainly find proof of it when they examined him" (A. 49). Dr. Watson's opinion of petitioner's condition on August 1973, was "he just simply had healed from a back strain of May" (A. 53). He recommended that the petitioner could return to work without any limitations (A. 50). Dr. Glover, the radiologist, testified as set out above that the myelographic study was completely normal (A. 61) and that he was in agreement with Dr. Watson as to the results of the myelographic study (A. 64).

There was substantial evidence in this case that indicated that there was no permanent disability as a result of the original back strain and that there should be no reduced earning ca-

pacity as a result of this injury. Nevertheless, in determining that the maximum amount of damages the jury could reasonably find was $50,000.00 and in reducing the jury's award accordingly, the trial court, nevertheless, permitted compensation for these two damage elements. However, the trial court could not be said to have clearly abused its discretion by considering all of the evidence relating to earning capacity and permanancy of the injury including the evidence of petitioner's own physician which negated a finding of permanent injury or resultant diminution of earning capacity and, accordingly, reducing the unsupported excess of the jury's award for these elements.

Pain and Suffering: The record does contain the statements of petitioner himself that he suffered pain following his back sprain. However, the subjective complaints of pain of petitioner that he expressed to his treating physician must not be considered in a vacuum but along with the negative objective findings of residual injury recorded by his treating physician. The record is replete with negative objective findings of results and tests by the various physicians who examined him (A. 34, 35, 37, 38, 39, 40, 42, 43). In reducing the verdict, the trial court was entitled to consider both the evidence which negated a finding of prolonged and severe pain and suffering and the insubstantial nature of any objective evidence of continuing pain and suffering. On retrial, Judge Henley awarded petitioner $10,000.00 for pain and suffering (Supp. A. 8). On the testimony of this record, $10,000.00 for pain and suffering was not a parsimonious award in the absence of objective symptoms of permanent injury.

PETITIONER'S AUTHORITIES

The award of damages in *Grunenthal v. Long Island R.R.*, 393 U.S. 156 (1968), relied on by petitioner, has no bearing on the case at bar. In *Grunenthal*, the plaintiff's foot was hopelessly crushed by a 300 pound railroad tie, necessitating several operations including removal of bone, skin grafts and treatment for gangarene. There remained concern that the foot would be lost. Clearly no relation exists between those injury facts and the facts in the case at bar so as to support a similar outcome in the two cases.

Although petitioner also argues that the decision in the Eighth Circuit Court of Appeals contrasts with the results in *Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir. 1969), and *Gorsalitz v. Olin Mathieson Chemical Co.*, 456 F.2d 180 (5th Cir. 1972), the injury facts in those cases likewise show why the ultimate results in those decisions and the instant case should be different. The facts in *Taylor* show that the plaintiff had an accident which led to a fusion of his wrist and permanent disability. The plaintiff had incurred $5,000.00 in special damages. The Court held that these facts alone would not support an $80,000.00 verdict. However, the original injuries proximately caused the plaintiff to develop ulcers with the resulting loss of 75 per cent of his stomach. There remained a chance the ulcer would reoccur. The pain and suffering, the anxiety, and the loss of enjoyment of life traceable to the stomach condition over plaintiff's life expectancy represented the principal evidence of permanent injury in support of the $80,000.00 award. *Taylor v. Washington Terminal Co.*, *supra*, at 149. Clearly, the facts in *Taylor* are not comparable to the facts in the case at bar and thus it is understandable why the final result in *Taylor* case did not control the Eighth Circuit's decision in the present case even though the reviewing standard was the same.

The injury facts in *Gorsalitz v. Olin Mathieson Chemical Co.*, *supra*, are even more inconsistent with the damage facts of the

instant case. There, the plaintiff had the whole side of his head burned off by a high voltage transformer. A jury awarded plaintiff a lump sum of $1,380,000.00 as compensation for his injury. The trial judge reduced the verdict to $690,633.00. The decision on appeal was that some part of the verdict should be remitted, but the Court of Appeals did not agree with the amount that the District Court had remitted since the District Court used the wrong standard in ordering the remittitur. After remand, the District Court entered a remittitur which reduced the verdict to $887,029.00. Subsequently after correcting the remittitur to a verdict of $889,766.00, the action of the trial court was affirmed. The difference between the two amounts was a result of the Court of Appeals recomputing the lost wages from $46,213.00 to $48,950.00. Thus, a remittitur of $490,234.00 was ultimately upheld. *Gorsalitz v. Olin Mathieson Chemical Co.*, 456 F.2d 180 (5th Cir. 1972).

There is no correlation between the injuries in the case at bar, a sprained back without surgical intervention or any rating of percent of functional disability to petitioner's body as a whole, and the crushed foot in *Grunenthal*. No factual comparison exists between the injury in this case and the fused wrist and loss of 75 percent of the plaintiff's stomach in *Taylor*, or the serious burns in *Gorsalitz*. It is submitted that none of those cases are useful as a guide as to the dollar amount of damages recoverable in the case at bar.

SUMMARY

The Court of Appeals for the Eighth Circuit clearly ascertained that the trial judge gave proper consideration to the jury's role in assessing damages and did not substitute his view of the damages for that of the jury. The Court of Appeals thoroughly reviewed the injury and damage evidence and concluded that the trial court did not clearly abuse its discretion in ordering a

remittitur to reduce the verdict to $50,000.00, two and one-half times the maximum amount of $20,000.00 which the trial court itself felt was fair and reasonable.

The present Petition for Writ of Certiorari involves no substantial legal issues but only a factual argument as to the inferences to be drawn from the damage evidence. The decision of the Court of Appeals, *Slatton v. Martin K. Eby Construction Co.*, 506 F.2d 505 (8th Cir. 1974), is in accord with the decisions of the other circuits and none of the considerations of Rule 19 of the Rules of the United States Supreme Court are present. Petitioner's comment on page 3 of its Petition, that he agreed to let the case be tried on the record previously made for the stated reason that he felt that no verdict of $50,000.00 would ever be sustained by the trial judge is presumptuous conjecture on his part. What the trial judge would have done in the event a second trial to a jury had resulted in a verdict equal to or greater than the first verdict is unknown. It is more plausible to speculate that had a second jury returned a verdict equal to or greater than the first verdict, the trial judge would have felt bound by a second jury's damage award and not required the same remittitur. The petitioner voluntarily chose not to accept the $50,000 00 remittitur or a second jury trial on the issue of damages but elected to have the damage issue retried to the Court knowing the Court's own evaluation of his injury and without offering any new medical evidence on the doubtful issue of the permanency of this injury. This decision and the resultant verdict in the second trial which was not appealed to the Court of Appeals should have no bearing on this Court's consideration of the Petition for Certiorari.

CONCLUSION

Respondent respectfully submits that the Petition for Writ of Certiorari does not raise legal issues worthy of its issuance and should be denied and the decision of the Court of Appeals for the Eighth Circuit affirming the District Court be allowed to stand.

Respectfully submitted

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